IN THE SUPREME COURT OF MISSOURI

No. SC93134

JODIE NEVILS,

Appellant,

v.

GROUP HEALTH PLAN, INC et al.

Respondents.

TRANSFER FROM THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

AMICUS CURIAE BRIEF OF THE UNITED STATES IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The United States respectfully submits this *amicus curiae* brief.

This case presents the question whether Missouri's anti-subrogation rule is preempted by the Federal Employee Health Benefits Act (FEHBA), which provides that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). The United States has a strong interest in the correct resolution of this issue, which concerns the health-insurance benefits that the federal government provides to federal employees pursuant to federal law.

STATEMENT

A. Statutory Background

1. Congress enacted the Federal Employees Health Benefits Act of 1959, Pub. L. No. 86-382, 73 Stat. 708, to establish a comprehensive program that would "assure maximum health benefits for [federal] employees at the lowest possible cost to themselves and to the Government." H.R. Rep. No. 86-957, at 4 (1959). Through FEHB plans,

the federal government provides health insurance to millions of federal employees and their dependents.

The U.S. Office of Personnel Management administers the Federal Employees Health Benefits Act. The Act gives OPM authority to contract with insurance carriers to offer benefits to federal employees, annuitants, and dependents, 5 U.S.C. §§ 8902, 8903, 8903b, to seek civil penalties against FEHB insurance carriers who engage in misconduct in administering federal health plans, *id.* § 8902a(d), and to promulgate regulations implementing FEHBA, *id.* § 8913(a). Each contract must contain "a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as the Office considers necessary or desirable." *Id.* § 8902(d).

Federal employees have the option to enroll in FEHB plans under the terms of the contracts between OPM and insurance carriers. 5 U.S.C. § 8905(a). OPM must provide to federal employees the information necessary to make an informed choice among the various plans offered under FEHB, and OPM issues each enrolled employee a detailed statement setting forth the plan terms and procedures for obtaining benefits under the plan. *Id.* § 8907.

The federal government shares responsibility with enrolled employees for paying the premiums under FEHB plans. 5 U.S.C. § 8906. The federal government pays on average approximately 70% of the employee's plan premium. *Id.* § 8906(b), (f). FEHB premiums are generally deposited into the Employee Health Benefits Fund in the U.S. Treasury. *Id.* § 8909(a).

Most FEHB program contracts provide for a right of subrogation. A right of subrogation requires, among other things, FEHB beneficiaries to reimburse the plan if the beneficiary recovers a tort judgment or settlement that compensated the insured, in whole or in part, for health-insurance benefits the plan paid. Carriers must seek reimbursement in accordance with the FEHB contract. The funds received from subrogation recoveries by experienced-rated carriers, such as fee-for-service carriers, are credited to the Employee Health Benefits Fund held by the Treasury. *See* 5 U.S.C. § 8909(a). Any surplus in the FEHB fund may be used, based on negotiations between OPM and the carrier, to reduce future government and employee contributions, increase plan benefits, or refund money to the government and plan enrollees. 5 U.S.C. § 8909(b); 5 C.F.R.

§ 890.503(c)(2). Subrogation recoveries credited to the FEHB fund thus translate to direct savings for the federal government and FEHB enrollees.

FEHB carriers also include community-rated carriers. Subrogation recoveries by community-rated carriers also lower subscription charges for enrollees and the federal government, but through a different mechanism. The premiums that community-rated carriers charge generally depend on the expected cost of providing benefits. Subrogation recoveries by community-rated carriers tend to reduce those expected costs, and thus the premiums.

OPM has the ultimate authority to determine whether a claim for medical services should be paid under the FEHB program. 5 U.S.C. § 8902(j). If a carrier denies payment for a claim, the covered employee may seek OPM review. 5 C.F.R. § 890.105(a)(1). OPM's determination is subject to judicial review in federal court under the Administrative Procedure Act. 5 U.S.C. §§ 701, 706.

2. In the mid-1970s, Congress became concerned that various forms of state health insurance legislation affecting FEHB health insurance plans were resulting in "[i]ncreased premium costs to both

the Government and enrollees," as well as "[a] lack of uniformity of benfits [sic] for enrollees in the same plan which would result in enrollees in some States paying a premium based, in part, on the cost of benefits provided only to enrollees in other States." H.R. Rep. No. 94-1211, at 3 (1976). Many states had begun enacting laws "requiring not only specific types of care but the extent of benefits, family members to be covered, the age limits for family members, extension of coverage, the format and the type of informational material that must be furnished, including in some instances the type of language to be used . . . ." H.R. Rep. No. 95-282, at 6-7 (1977); *see* S. Rep. No. 95-903, at 7 (1978). Congress cured the emerging disuniformity by enacting a preemption provision providing that "[t]he provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions." Act of Sept. 17, 1978, Pub. L. No. 95-368, 92 Stat. 606.

In 1998, Congress broadened the FEHBA preemption provision. *See* Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2363, 2366. Congress, in particular, preempted not only laws regulating the nature and extent of benefits, but also those regulating the provision of coverage or benefits—such as laws that regulate nationwide managed-care organizations. *See* H.R. Rep. No. 105-374, at 9, 16 (1997). Congress also eliminated as a prerequisite to preemption that a state law be "inconsistent" with a FEHB contract, "thereby giving the federal contract provisions clear authority." S. Rep. No. 105-257, at 15 (1997). Congress did so to "to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," and to "prevent carriers' cost-cutting initiatives from being frustrated by State laws." H.R. Rep. No. 105-374, at 9 (1997).

As amended, the FEHBA's preemption provision provides that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local

law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1).

B. Factual Background

This case arises from an FEHB contract entered into between OPM and Group Health Plan Inc., a community-rated health plan. Section 2.5 of that contract provided that the carrier "shall subrogate FEHB claims in the same manner in which it subrogates claims for non-FEHB members" under certain conditions, including where the carrier "is doing business in a State in which subrogation is prohibited, but in which the Carrier subrogates for at least one plan covered under the Employee Retirement Income Security Act of 1974." Legal File (LF) 57. Although Missouri law generally prohibits insurance subrogation, *see*, *e.g.*, *Schweiss* v. *Sisters of Mercy, St. Louis, Inc.*, 950 S.W.2d 537, 538 (Mo. Ct. App. 1997), GHP subrogates FEHB claims in Missouri because it subrogates for at least one ERISA plan in Missouri, *see* LF 218.

Plaintiff Jodie Nevils is a former federal employee who was covered by a GHP-administered FEHB health-insurance plan while he was with the government. LF 292-93. In November 2006, plaintiff sustained injuries in a car crash. LF 292. The FEHB plan paid

approximately $18,000 in benefits to defray plaintiff's medical bills. LF 293, 571. Plaintiff brought a tort suit against the driver and settled the case. LF 293. Pursuant to the FEHB plan's subrogation clause, GHP's agent, ACS Recovery Services Inc., asserted a lien against the settlement proceeds. LF 293, 573. ACS, GHP, and plaintiff settled the lien for $6,592.24. LF 575.

Plaintiff then brought this class-action suit in St. Louis County Circuit Court. The suit asserted multiple state-law causes of action against GHP, all of which were premised on the assertion that the actions of GHP and ACS in collecting $6,592.24 from plaintiff's tort settlement violated Missouri's anti-subrogation law. LF 294-300. Plaintiff sought unspecified damages and injunctive relief. LF 300.

GHP and ACS sought summary judgment, principally on the ground that the Federal Employees Health Benefits Act preempts Missouri's anti-subrogation law. LF 8-12, 349-62. The trial court agreed, explaining that the case was controlled by *Buatte* v. *Gencare Health Sys., Inc.*, 939 S.W.2d 440 (Mo. Ct. App. 1996), LF 864-65, which held that "Missouri state law prohibiting subrogation is preempted by the FEHBA." *Id.* at 442. The trial court found no basis for plaintiff's

argument that more recent court decisions had deprived *Buatte* of its precedential effect, and no reason not to follow that controlling precedent. LF 865. The court therefore granted GHP and ACS summary judgment on all claims. *Id.*

The Missouri Court of Appeals affirmed, agreeing with the trial court that *Buatte* was controlling. 2012 WL 6689542, at *3 (Mo. Ct. App. Dec. 26, 2012). The court of appeals rejected plaintiff's arguments that *Buatte* should be reconsidered in light of subsequent legal developments. *Id.* at *3-*5. Plaintiff argued, specifically, that the Supreme Court's decision in *Empire Healthchoice Assurance* v. *McVeigh*, 547 U.S. 677 (2006), which also involved subrogation rights under a FEHB contract, controlled the preemption question presented here. The court of appeals explained, however, that "[t]he *Empire* court's holding was solely that federal question jurisdiction was lacking" over an action to enforce an insurance company's right to reimbursement for benefits paid under a FEHB contract. *Id.* at *5. The court of appeals observed that this holding was "not even tangentially related" to the separate question of whether the FEHBA preempts Missouri's anti-subrogation rule. *Id.*

This Court granted plaintiff's motion to transfer.

POINTS RELIED ON

Response To Appellant's Point I: The Court Of Appeals Correctly Concluded That The Federal Employee Health Benefits Act Preempts Missouri's Anti-Subrogation Rule.

5 U.S.C. § 8902(m)(1)

FEHB Program Carrier Letter No. 2012-18 (June 18, 2012)

Buatte v. *Gencare Health Sys., Inc.*, 939 S.W.2d 440 (Mo. Ct. App. 1996)

MedCenters Health Care v. *Ochs*, 26 F.3d 865 (8th Cir. 1994)

NALC Health Benefit Plan v. *Lunsford*, 879 F. Supp. 760 (E.D. Mich. 1995)

ARGUMENT

The Federal Employee Health Benefits Act Preempts Missouri's Anti-Subrogation Rule.

A. Section § 8902(m)(1) Unambiguously Preempts Missouri's Anti-Subrogation Rule.

Like most health-insurance contracts, FEHB contracts generally provide for a right of subrogation. A subrogation right, among other things, permits the FEHB plan to receive reimbursement for any benefits paid under the plan to the extent that the enrollee has separately received a tort recovery that also compensates for the very

same expenses paid by the plan. Subrogation rights, in other words, prevent enrollees from receiving double reimbursement for their medical expenses. The vast majority of state jurisdictions permit subrogation if provided for by the express terms of a health insurance contract. Missouri, however, is in the minority of jurisdictions that do not permit subrogation, even when a health-insurance contract provides for it. *See* Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723, 734-35 & n.56 (2005).

1. The question in this case is whether the FEHBA preempts Missouri's anti-subrogation rule. The FEHBA provides that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1).

The sweeping terms of this express preemption provision comfortably encompass anti-subrogation laws. FEHB contract terms that provide a right of subrogation directly "relate to the . . . extent of

coverage or benefits" or, at the very least, "payments with respect to benefits." 5 U.S.C. § 8902(m)(1). Subrogation rights relate to benefit payments because they require a beneficiary to return benefits to the extent the beneficiary has been separately reimbursed for those benefits from a tort recovery. As the Missouri Court of Appeals observed in holding that the FEHBA preempts Missouri's anti-subrogation rule, "prohibiting" the carrier "from seeking reimbursement from its insured would clearly differ the extent of coverage or benefits." *Buatte* v. *Gencare Health Sys., Inc.*, 939 S.W.2d 440, 442 (Mo. Ct. App. 1996); *accord MedCenters Health Care* v. *Ochs*, 26 F.3d 865, 867 (8th Cir. 1994) (holding Minnesota anti-subrogation law preempted by § 8902(m)(1)); *NALC Health Benefit Plan* v. *Lunsford*, 879 F. Supp. 760, 762-63 (E.D. Mich. 1995) (holding that § 8902(m)(1) preempted Michigan law to the extent Michigan law prohibited subrogation).

In this case, there is no dispute that the subrogation right in Section 2.5 of the GHP contract establishes that plaintiff is not entitled to FEHB benefits to the extent that plaintiff's medical bills were separately reimbursed out of a tort recovery or settlement. If plaintiff's state-law suit based on Missouri's anti-subrogation rule succeeds in

defeating that right, plaintiff will have been permitted to retain FEHB benefits that he is not entitled to keep under the terms of the FEHB contract. Missouri's anti-subrogation rule straightforwardly relates to the extent of coverage or benefits under an FEHB plan and is therefore preempted.

2. The conclusion that Missouri's anti-subrogation rule relates to benefits and coverage, as well as payments with respect to benefits, draws support from Supreme Court cases construing the term "relat[es] to" in a preemption provision to "express a broad pre-emptive purpose." *Morales* v. *TWA*, 504 U.S. 374, 383 (1992). The Supreme Court has, with regard to the similarly worded preemption clause applicable to health-care plans regulated by the Employee Retirement Income Security Act of 1974, held that state anti-subrogation laws "relate to" such plans. *See FMC Corp.* v. *Holliday*, 498 U.S. 52, 58-59 (1990); *see also Botsford* v. *Blue Cross & Blue Shield of Montana, Inc.*, 314 F.3d 390, 394 (9th Cir. 2002) (applying ERISA case law to interpreting 5 U.S.C. § 8902(m)(1)). In reaching that conclusion, the Supreme Court observed that anti-subrogation laws are related to the provision of benefits in that they "require[] plan providers to calculate benefit levels

. . . based on expected liability conditions that differ from those in States that have not enacted similar antisubrogation legislation," thus "frustrat[ing] plan administrators' continuing obligation to calculate uniform benefit levels nationwide." *FMC Corp.*, 498 U.S. at 60. ERISA regulates the benefit plans that private employers offer their employees, while the FEHBA governs the health-benefit plans that the federal government provides. It is exceedingly unlikely that Congress intended a broader role for state law in the case of federal employees than in the case of private employees, or that Congress desired less uniformity in the case of federal employees.

3. The history and purpose of the FEHBA preemption provision confirms that Congress intended it to supersede state anti-subrogation law.

In the mid-1970s, states began undermining the uniformity of the FEHB program by mandating that insurance companies provide health-insurance benefits that were not covered under the terms of FEHB contracts. *See, e.g.*, H.R. Rep. No. 95-282, at 6 (1977). Congress became concerned that those laws resulted in FEHB enrollees in some states paying for benefits that they were not receiving, since some benefits

were only provided in states that had mandated-benefit laws. *See* H.R. Rep. No. 94-1211, at 3 (1976). Congress also expressed concern that state mandated-benefit laws were increasing the cost of the FEHB program to the federal government, *see id.*, which pays the lion's share of FEHB premiums. In response to those developments, Congress broadly preempted state laws related to benefits or coverage that were inconsistent with FEHB contract terms, and later broadened preemption to supersede even state laws that were not expressly inconsistent with FEHB contracts. *See* Pub. L. No. 95-368, 92 Stat. 606 (1978); Pub. L. No. 105-266, § 3(c), 112 Stat. 2363, 2366 (1998).

Missouri's anti-subrogation rule is indistinguishable from the state mandated-benefit laws that Congress expressly targeted with the enactment of the FEHBA preemption provision. By permitting an FEHB enrollee to retain benefits that have been separately reimbursed by a tort recovery, Missouri law effectively requires FEHB providers to provide Missouri consumers with FEHB benefits that consumers in other states do not receive under the terms of the same FEHB contract. Most FEHB enrollees receive benefits under nationwide plans with uniform rates. If Missouri's anti-subrogation rule survives preemption,

then, the loser will be FEHB enrollees in states that permit subrogation, who will be subsidizing the more generous benefits that Missouri law effectively mandates that FEHB carriers provide to Missouri residents. That kind of cross-subsidization creates precisely the disuniformity that Congress intended to preclude when it enacted the preemption provision, which it intended to "strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live." H.R. Rep. No. 105-374, at 9 (1997).

Missouri's anti-subrogation rule also runs contrary to another key aim of Congress in providing for preemption, which was to "prevent carriers' cost-cutting initiatives from being frustrated by State laws." H.R. Rep. No. 105-374, at 9 (1997). Although not all FEHB contracts necessarily provide for a right of subrogation, the vast majority do. Any subrogation recoveries obtained by the carrier tend to reduce the premiums charged both to individuals enrolled in the FEHB program and to the federal government, which pays the bulk of FEHB premiums. The federal government's share of those premiums amounted to approximately $31.5 billion in 2012 alone.

Even if plaintiff were correct that subrogation does not relate to benefits within the meaning of § 8902(m)(1), then, Missouri's law would still be in conflict with the FEHBA because it would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona* v. *United States*, 132 S. Ct. 2492, 2505 (2012) (internal quotation marks and citation omitted); *see id.* at 2501.

B. The Supreme Court's Decision In *McVeigh* Did Not Hold Otherwise.

In contending that state laws prohibiting subrogation survive the FEHBA's preemption provision, plaintiff makes virtually no attempt to grapple with the statute's language, purpose, or history. Instead, plaintiff spends the bulk of his brief arguing that the Supreme Court in *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006), has already decided the preemption question presented in this case in his favor. Pl. Br. 12-19. That contention is without merit.

1. The question presented in *McVeigh* was whether there is federal jurisdiction over a suit brought by a FEHB health-insurance carrier to recover reimbursement that a beneficiary allegedly owed the FEHB program under an FEHB contract. 547 U.S. at 683. The Supreme Court held that there is no federal-question jurisdiction over

such a suit, emphasizing that "Congress has not expressly created a federal right of action enabling insurance carriers . . . to sue health-care beneficiaries in federal court to enforce reimbursement rights under contracts contemplated by FEHBA." *Id.* at 693.

In the course of resolving the jurisdictional issue, the Court explored the meaning of the preemption provision. "Reading the reimbursement clause" in the FEHB contract "as a condition or limitation on 'benefits' received by a federal employee," the Court explained, "the clause could be ranked among '[contract] terms . . . relat[ing] to . . . coverage or benefits' and 'payments with respect to benefits,' thus falling within § 8902(m)(1)'s compass." *Id.* at 697 (alterations the Supreme Court's). "On the other hand," the Court continued, "a claim for reimbursement ordinarily arises long after 'coverage' and 'benefits' questions have been resolved, and corresponding 'payments with respect to benefits' have been made to care providers or the insured." *Ibid.* "With that consideration in view, § 8902(m)(1)'s words may be read to refer to contract terms relating to the *beneficiary's* entitlement (or lack thereof) to Plan payment for certain health-care services he or she has received, and not to terms

relating to the carrier's postpayments right to reimbursement." *Ibid.* (Court's emphasis). The Court, however, explained that it "need not choose between those plausible constructions" of the preemption clause "[t]o decide this case." *Id.* at 698.

Contrary to plaintiff's contention, the Supreme Court in *McVeigh* did not decide, and in fact expressly declined to decide, that state laws affecting a FEHB carrier's right to reimbursement do not relate to coverage or benefits under § 8902(m)(1). Although the Court did at one point "distinguish[] . . . between benefits and reimbursement," *Blue Cross Blue Shield* v. *Cruz*, 495 F.3d 510, 513 (7th Cir. 2007), the Court also found it "plausible" to construe a carrier's right to reimbursement for benefits as directly relating to benefits, or at least "payments with respect to benefits." *McVeigh*, 547 U.S. at 698; *see id.* at 697; *see also Cruz*, 495 F.3d at 514 (deciding that federal jurisdiction did not exist over a carrier's reimbursement suit, but declining to decide whether state law was preempted under § 8902(m)(1)).

Plaintiff contends, based on the presumption against preemption of state law, that the Supreme Court's ambivalence about which of these interpretations is correct compels the conclusion that only one of

them is correct—*viz.*, the interpretation disfavoring preemption. Pl. Br. 18-19. That argument is irreconcilable with the Supreme Court's conclusion that it is "plausible" to conclude that the FEHBA preempts state anti-subrogation laws, *McVeigh*, 547 U.S. at 698, which the Court would not have done if, as plaintiff asserts, the presumption against preemption made that interpretation implausible and impermissible. *McVeigh* therefore in no way diminishes the conclusion that the broad, sweeping language of the FEHBA preemption provision encompasses state anti-subrogation laws.

2. In any event, the Supreme Court's tentative attempt in *McVeigh*—in at best nonbinding *dictum*—to distinguish "benefits" from "reimbursement" is simply untenable, particularly in the context of anti-subrogation laws such as the one before the Court in this case. Even putting to one side the evident oddity of viewing a right to reimbursement of benefits as being unrelated to benefits, a right of subrogation is not limited to "reimbursement," and may indeed directly concern "the *beneficiary's* entitlement (or lack thereof) to Plan payment for certain health-care services he or she has received." *McVeigh*, 547 U.S. at 697 (emphasis the Supreme Court's). If a beneficiary, for

example, received a tort judgment that compensates for medical bills covered under the plan before receiving FEHB benefits from the carrier, a subrogation right would permit the carrier to deny the enrollee benefits before the plan ever paid them. Denying benefit payments clearly "relates to benefits." But the only difference between that scenario and the facts of this case is that here, the carrier paid plaintiff FEHB benefits before he obtained his tort settlement (or at least before the carrier or its recovery agent was aware of it). That distinction should make no difference: a subrogation right does not become unrelated to benefits simply because the benefits happen to have already been paid, and the carrier must seek reimbursement of improperly retained benefits after the fact from a tort judgment or settlement. Plaintiff's submission, by contrast, rests on the implausible presumption that Congress intended preemption of subrogation laws to depend on the timing of a tort judgment or settlement.

3. Since the Supreme Court decided *McVeigh*, the U.S. Office of Personnel Management, the agency Congress entrusted with administering the FEHBA, *see Dyer* v. *Blue Cross & Blue Shield Ass'n, Inc.*, 848 F.2d 201, 205 (D.C. Cir. 1988); *Blue Cross & Blue Shield* v.

Dep't of Banking & Finance, 791 F.2d 1501, 1506 (11th Cir. 1986), has in an opinion letter construed 5 U.S.C. § 8902(m)(1) to preempt state anti-subrogation laws, adopting the interpretation of the preemption provision that the Supreme Court explicitly characterized as plausible in *McVeigh*. *See* FEHB Program Carrier Letter No. 2012-18 (June 18, 2012), Add. A1. OPM's letter confirms that a right of subrogation "is both a condition of, and a limitation on, the payments that enrollees are eligible to receive for benefits," and therefore preempts state laws that defeat subrogation rights. *Ibid.* OPM's letter also explains the strong federal interest in preemption of state anti-subrogation laws, which tend to increase the expense of the FEHB program. *Ibid.*

Although OPM's opinion letter lacks the force of law that typically accompanies a regulation promulgated after notice-and-comment rulemaking, OPM's authoritative construction of the FEHBA is nonetheless entitled to substantial weight.[1] *See Christensen* v. *Harris*

[1]Plaintiff's substitute brief asserts that OPM's opinion letter is "factually inaccurate and misleading" in stating that "Carriers are required to seek reimbursement and/or subrogation in accordance with the contract." Pl. Br. 23 (internal quotation marks omitted). But that statement is accurate because OPM's point is simply that, if an FEHB

Continued on next page.

County, 529 U.S. 576, 587 (2000) (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also Dyer*, 848 F.2d at 205; *Blue Cross & Blue Shield*, 791 F.2d at 1506 (OPM's construction of § 8902(m)(1) entitled to deference as long as it is "reasonable"). OPM's plausible interpretation should be granted deference, *see Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980-82 (2005), and confirms that Missouri's anti-subrogation rule is preempted.

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contract requires subrogation, the carrier should seek subrogation as the contract provides.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief contains the information required by Supreme Court Rule 55.03; complies with the limitations contained in Rule 84.06(b); and contains 4,264 words. This brief was prepared using Microsoft Word in Century Schoolbook 14-point font. The electronic version of this brief has been scanned and is free of viruses.

S/ Nicholas P. Llewellyn
NICHOLAS P. LLEWELLYN

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2013, I electronically filed the foregoing brief with the Clerk of the Court of the Missouri Supreme Court by using the Missouri eFiling system. I certify that all parties in the case are registered eFiling users and that service will be accomplished by the Missouri eFiling system:

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